Supreme Court, U.S.
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In The

Supreme Court of the United States

DOMINO'S PIZZA, LLC,
DOMINO'S PIZZA, INC., AND DEBBIE PEAR,

Petitioners,

v.

JOHN MCDONALD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In the absence of a contractual relationship with the defendant, are allegations of personal injuries alone sufficient to confer standing on a plaintiff pursuant to 42 U.S.C. § 1981?

LIST OF PARTIES

The parties to the proceedings are identified in the caption of the case. In accordance with S. Ct. R. 29.6, petitioners Domino's, Inc. and Domino's Pizza LLC state that Domino's, Inc. owns 100 percent of the membership interest in Domino's Pizza LLC. Since July 2004, the stock of Domino's, Inc. has been publicly traded on the New York Stock Exchange under the ticker symbol "DPZ."

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PETITION FOR A WRIT OF CERTIORARI

Enacted as part of the Civil Rights Act of 1866, 42 U.S.C. § 1981 protects the ability "to make and enforce contracts" free from racial discrimination. By its plain terms § 1981 encompasses claims of discrimination by a party to a contract, but it does not provide an individual cause of action for nonparties who are incidentally affected by the alleged discrimination. With the exception of the Ninth Circuit, every United States Court of Appeals to consider this issue has come to the same conclusion: a nonparty to a contract lacks standing to bring a suit for discrimination under § 1981. In its decision below, the Ninth Circuit has broken rank with its sister circuits, holding that a nonparty to a contract has standing to bring suit under § 1981 if he or she alleges "separate and distinct" injuries arising out of the discriminatory behavior.

The result of the Ninth Circuit's decision in this case is an unwarranted expansion of liability for defendants under § 1981 as well as the destruction of national uniformity in the interpretation and application of the Civil Rights Act. Review by this Court is necessary now rather than later to address the negative public policy implications of the Ninth Circuit's interpretation of § 1981 and to correct the Ninth Circuit's erroneous statement of the law.

OPINIONS BELOW

The unpublished memorandum of the United States Court of Appeals for the Ninth Circuit was issued on June 18, 2004. (App. 1-2.) The Ninth Circuit's unpublished order denying rehearing and rehearing en banc was issued on August 2, 2004. (App. 8.) The unpublished order of the

district court granting Domino's motion to dismiss was issued on August 23, 2002. (App. 3-7.)

JURISDICTIONAL STATEMENT

Jurisdiction lay in the district court pursuant to 28 U.S.C. § 1331. The United States Court of Appeals for the Ninth Circuit entered a memorandum reversing the district court's decision and remanding the case to the district court on June 18, 2004. The Ninth Circuit entered an order denying rehearing and rehearing en banc on August 2, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Equal Rights Under the Law

Section 1 of the Civil Rights Act of 1866, as amended by the Civil Rights Act of 1991 (42 U.S.C. § 1981)

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

STATEMENT OF THE CASE

The Contract Between JWM Investments, Inc. and Domino's

This case arises out of the contractual relationship between Petitioners Domino's Pizza LLC and Domino's Pizza, Inc. (collectively, "Domino's") and non-party JWM Investments, Inc. ("JWM"), a Nevada corporation. (App. 11.)[1] Domino's entered into four contracts with JWM for the construction of four restaurants in Las Vegas, Nevada. (*Id.*) The Domino's contracts were with JWM, not with Respondent John McDonald. (*Id.*; *see also* App. 14.) While McDonald is the president and sole shareholder of JWM (App. 11), he personally never sought, entered into, or was bound by any contract with Domino's. (App. 11, 14.)

[1] A copy of the verified complaint is included in the attached appendix at 9-19.

The Relationship Between Domino's and JWM Deteriorates

After delays in the second construction project, the relationship between JWM and Domino's "soured." (App. 12.) Domino's sought JWM's consent to voluntarily cancel the contracts for the remaining projects, but JWM refused. (App. 12.) Nevertheless, Domino's eventually terminated its contracts with JWM. (App. 13.) Although Domino's strenuously denies the allegation, McDonald alleges that Domino's terminated its contrac. with JWM because McDonald is African-American.[2] (App. 13, 16.)

McDonald Files Suit Against Domino's, Claiming Various Personal Injuries

McDonald sued Domino's and petitioner Debbie Pear on his own behalf, pursuant to 42 U.S.C. § 1981. (App. 9.) McDonald's complaint alleges that he suffered, *inter alia*, financial loss, emotional distress, mental anguish, and humiliation – all caused by Domino's termination of its contracts with JWM. (App. 16-17.)

[2] The only tangible basis of this allegation deserves passing note. Allegedly Debbie Pear, Domino's real estate negotiator, in expressing frustration at JWM's delays, commented to McDonald that she did not like dealing with "you people." (App. 12-13.) While those expecting racial bigotry might see this as proof of their assumption, the comment also has common race-free applications where the company with which one is dealing experiences persistent delays and raises numerous excuses.

The District Court Dismisses McDonald's Claims For Lack of Standing

Domino's moved to dismiss McDonald's complaint on the ground that, not being a party to the contracts at issue, McDonald lacked standing under 42 U.S.C. § 1981. (App. 3.) The district court agreed and granted the motion. (*Id.*) McDonald appealed this ruling to the Ninth Circuit.

The Ninth Circuit Court of Appeals Reverses and Remands

On appeal, a three-judge panel of the Ninth Circuit reversed and remanded the case back to the district court. (App. 1-2.) The court concluded that "[t]hough our sister circuits may reach a contrary result . . . ," it was bound by its decision in *Gomez v. Alexian Bros. Hosp.*, 698 F.2d 1019 (9th Cir. 1983). (App. 2.) Thus relying on *Gomez*, the Ninth Circuit held:

> While McDonald was not formally a party to the contract, he may nonetheless sue under § 1981 insofar as he seeks recovery for individual injuries separate and distinct from contract damages suffered by JWM Investments, Inc.

(App. 2.)

Domino's Requests for Rehearing and Rehearing en Banc Were Denied With One Dissent

On August 2, 2004, the Ninth Circuit panel denied Domino's petition for rehearing and petition for rehearing en banc. (App. 8.) One member of the panel, Judge

Diarmuid F. O'Scannlain, voted to grant the petition for rehearing en banc. (*Id.*)

REASONS FOR GRANTING THIS PETITION

No less than four United States Courts of Appeals have reached the conclusion that the lack of a contractual relationship with the defendant takes a plaintiff's claims out of the zone of interests protected by 42 U.S.C. § 1981 and therefore destroys standing.[3] These courts agree that the plain language of § 1981, which guarantees "[a]ll persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens," specifically protects the right to contract. Thus, a plaintiff does not have a cause of action under § 1981 where the plaintiff has neither a contractual relationship (or intended contractual relationship) with the defendant, nor has suffered interference with its contractual relationship (or intended contractual relationship) with a third party.

Without the benefit of reasoned analysis, the Ninth Circuit has adopted the position that standing under § 1981 is "coextensive" with standing under Title VII, thus expanding liability for defendants sued under § 1981 far beyond the scope contemplated by the statute's plain language. The only limit the Ninth Circuit's ruling places on a plaintiff's standing under § 1981 is that a plaintiff "seek[] recovery for individual injuries separate and

[3] It is a basic tenet of law that "prudential standing encompasses . . . the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Elk Grove Unified Sch. Dist. v. Newdow*, ___ U.S. ___, 124 S. Ct. 2301, 2309 (2004) (citation and internal quotation marks omitted).

distinct from contract damages," (App. 2), an inquiry that is wholly irrelevant to the determination of standing. The Ninth Circuit's careless decision raises the specter of liability run amok and has potentially broad policy implications for businesses attempting to contract under the precarious conditions created by its ruling. This Court should grant Domino's petition in order to resolve this conflict among the circuits and to clarify the scope of protection afforded by § 1981.

I. The Ninth Circuit's Ruling That Standing Under Section 1981 Does Not Require a Contractual Relationship Creates a Circuit Split Without Providing an Explanation for the Alternative Ruling

In this case, the Ninth Circuit relied entirely on *Gomez v. Alexian Bros. Hosp.*, 698 F.2d 1019 (9th Cir. 1983) in holding that standing under § 1981 does not require a contractual relationship. Unfortunately, *Gomez* did not address in any meaningful way the extent of standing under § 1981. Despite this shaky foundation, the Ninth Circuit held that McDonald had standing to bring his § 1981 cause of action against Domino's even though he acknowledged that he was not a party to Domino's contract with JWM Investments. The rule underlying the Ninth Circuit's decision in this case, taken from *Gomez*, is that a plaintiff need prove only an injury-in-fact, "separate and distinct" from contract damages, in order to establish standing under § 1981. In particular, the court of appeals held in this case:

> While McDonald was not formally a party to the contract, he may nonetheless sue under § 1981 insofar as he seeks recovery for individual injuries

> separate and distinct from contract damages suffered by JWM Investments, Inc.

(App. 2.)

In *Gomez*, the Ninth Circuit held that a physician of Hispanic origin who practiced medicine as an employee of a professional corporation had standing to sue under § 1981 when the defendant hospital rejected, for allegedly racial reasons, the corporation's contract proposal to operate the hospital's emergency room. *Gomez*, 698 F.2d at 1021-22. The physician had alleged injuries distinct from that of the corporation, including loss of employment as director of the defendant's emergency room, as well as "humiliation and embarrassment." *Id.* at 1021.

Gomez's fundamental weakness as binding precedent is its failure to analyze the specific requirements for standing pursuant to the plain language of § 1981. This is not surprising, as *Gomez* is first and foremost a Title VII[4] case. In fact, all but two sentences of the legal discussion in *Gomez* are devoted to addressing the hospital's contention that the doctor "lack[ed] standing under Title VII because an independent contractor relationship was contemplated between [the hospital] and [the professional corporation] and Tile VII was intended to protect only employment relationships." *Id.* at 1021. The *Gomez* court concluded that the doctor was entitled to have his Title VII claim tried on the merits, reasoning that Title VII extends standing even to individuals who do not stand in a direct

[4] Civil Rights Act of 1964, § 703(a), as amended, 42 U.S.C. § 2000e-2(a).

employment relationship with an employer. *Id.* at 1021-22. Without any further discussion, the court then concluded:

> The same is true of plaintiff's claim under §§ 1981 and 1985(3). "The guarantees of § 1981 and Title VII against racial discrimination are coextensive. . . ." *London v. Coopers & Lybrand*, 644 F.2d 811, 818 (9th Cir. 1981).

Id. at 1022. However, both *London v. Coopers & Lybrand*, 644 F.2d 811 (9th Cir. 1981) and *Carrion v. Yeshiva University*, 535 F.2d 722 (2nd Cir. 1976), the cases from which the language quoted in *Gomez* is derived, involved discriminatory interference with *employment contracts*. Obviously, where an employment contract is involved, Title VII (which concerns employment) and § 1981 (which concerns contracts) are "coextensive in scope."[5]

In *Gomez*, on the other hand, and even more obviously in this case, there is no employment contract and thus no basis for concluding that the broad standing requirement of Title VII – which extends standing to anyone who has suffered an injury in fact – also applies to § 1981. By

[5] In fact, once a plaintiff has shown the applicability of Title VII, any claim based on § 1981 is "superfluous," which explains why the *Gomez* court dealt so dismissively with the § 1981 standing issue. As the Second Circuit reasoned in *Carrion*:

> The claims of discrimination which we have already discussed are specifically within Subchapter VI of Title 42 s 2000e et seq. [Title VII], which deals exclusively with equal employment opportunities ***and therefore makes reference to ss 1981 and 1983 superfluous***. No greater or lesser protection against discriminatory practices is provided in the latter sections and we do not understand appellant to argue otherwise.

Carrion, 535 F.2d at 729 (emphasis added).

relying on and expanding the language of *Gomez* without further explanation, the Ninth Circuit continues to misapply the standing requirements of § 1981.

II. The Thorough and Thoughtful Reasoning of Other Circuit Courts Illustrates That Standing Under Section 1981 Requires a Contractual Relationship

Several circuits have more closely examined the § 1981 standing issue in the years after the Ninth Circuit's *Gomez* decision. These courts have all held that a person who is not a party to the contractual relationship, or intended contractual relationship, out of which the discrimination arises has no standing to bring a § 1981 cause of action – even if that party alleges some injury, pecuniary, emotional, or otherwise. Most of these courts recognize that "Section 1981 . . . protects the right to enter into and preserve a contractual relationship, period. . . . The class of persons who may bring suit is therefore limited to persons who actually wish to enter into (or remain in) that relationship." *Kyles v. J.K. Guardian Sec. Serv., Inc.*, 222 F.3d 289, 303 (7th Cir. 2000) (citations omitted).

A. The Plain Language of Section 1981 Limits Standing to Those Plaintiffs Who Are Parties to the Contract at Issue

The Seventh Circuit, in a well-reasoned opinion, has held that because the language of § 1981 protects the contractual relationship itself, the statute limits the class of person who may sue to persons in the contractual relationship. *See Kyles*, 222 F.3d at 303. Notably, the *Kyles* court engaged in the detailed comparison of Title VII and

§ 1981 that the Ninth Circuit neglected to perform in *Gomez*.

In *Kyles*, the Seventh Circuit considered whether "job testers" (people who apply for jobs with the sole intention of testing for discrimination, not of actually accepting a position) who alleged that they were discriminated against by prospective employers stated a claim under Title VII and under § 1981. The court's opinion extensively analyzes the differences in the standing requirements of these two civil rights statutes. In particular, the court compared the broad scope of standing under VII, which Congress meant to extend to the outer boundaries laid down by Article III of the Constitution, with the narrow scope of standing under § 1981, which, by its terms, protects only the right to enter into and preserve a contractual relationship. As the court reasoned:

> When Congress made it unlawful for an employer "to limit, segregate, or classify his employees or applicants in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee . . . because of such individual's race. . . . ," 42 U.S.C. § 2000e-2(a)(2), it created a broad substantive right that extends far beyond the simple refusal or failure to hire. *Cf.* § 2000e-2(a)(1). . . . [A job applicant] therefore has standing to sue, even if she has not been harmed apart from the statutory violation. . . .
>
> * * *
>
> Section 1981, by contrast, does not proscribe any practice that might tend to interfere with one's ability to enter and enforce a contract; *it protects the right to enter into and preserve a contractual*

> *relationship, period*. Moreover, there is nothing in section 1981's language suggesting that Congress meant to stretch standing to the limits of Article III.

Kyles, 222 F.3d at 298, 303 (citations and footnote omitted) (emphasis added).

Recognizing these differences, the court held that the job testers, because they had been discriminated against by the employer, had standing under Title VII, but because they neither entered into nor sought any contractual relationship with the employer (and in fact were obligated to turn down any job offer they received), they did not have standing under § 1981. As the court concluded:

> The terms of 1981 are more narrow, however – it protects the contractual relationship itself. The class of persons who may bring suit is therefore limited to persons who actually wish to enter into (or remain in) that relationship. . . . The discrimination may be altogether real, and the [plaintiff] may have suffered an identifiable injury; but the employer has not deprived the [plaintiff] of her right to make or enforce contracts. *The [plaintiff's] injury, if any, is one that lies outside the zone of interests that section 1981 protects.*

Id. at 303-04 (citations omitted) (emphasis added).

The underlying reasoning of *Kyles* is in direct conflict with this case and *Gomez*, which are based on the Ninth Circuit's conclusion in *Gomez* that "[t]he guarantees of § 1981 and Title VII against racial discrimination are coextensive," *Gomez*, 698 F.2d at 1021, and that standing under § 1981 does not require a contractual relationship so long as the plaintiff claims some separate and distinct

injury. The Seventh Circuit's reasoned opinion demonstrates the shortsightedness of the Ninth Circuit's conclusion that standing under § 1981 is "coextensive" with standing under Title VII.

B. Standing Requirements Under Section 1981 Are Unaffected by a Plaintiff's Status as President/Sole Shareholder of the Contracting Company

Standing under § 1981 in the context of business contracts also requires a contractual relationship with the defendant. In *Searcy v. Houston Lighting & Power Co.*, 907 F.2d 562 (5th Cir. 1990), the president/sole shareholder of an energy resource firm sued various utility companies under § 1981 for refusing to enter into long-term natural gas supply contracts with the firm. The Fifth Circuit held that the plaintiff could not bring an individual § 1981 claim because the alleged discrimination could only be asserted to invade the legal rights of the corporation and not the rights of the plaintiff, the company's sole shareholder. *Id.* at 565. As the court reasoned:

> Searcy [the president], likewise, has no standing, individually, to assert claims against the defendants under section 1981. The discrimination alleged by Searcy can be asserted to invade the legal rights of [the corporation] only, since the corporation, and not its directors, officers, or shareholders, has any of the colorable rights that Searcy claims were violated by the defendants.

Searcy, 907 F.2d at 565.

In *Danco, Inc. v. Wal-Mart Stores, Inc.*, 178 F.3d 8 (1st Cir. 1999), the First Circuit also rejected the contention

that a sole shareholder of a corporation has standing to bring a § 1981 claim for his injuries where it is the corporation and not the shareholder that entered into the contract with the defendant. In *Danco*, the corporate plaintiff and the company's sole minority shareholder brought an action against Wal-Mart alleging racial discrimination under § 1981. The district court entered judgment on a jury verdict in favor of the plaintiffs. The First Circuit concluded that the individual plaintiff, as an employee or shareholder, could not collect damages on his own behalf. *Id.* at 14. The court reasoned:

> Nevertheless, in the present case Danco [the corporation] has a potential claim under section 1981, but Guiliani [the sole shareholder of the corporation] does not. The same statutory language that gives a claim to Danco, as an independent contractor with Wal-Mart, precludes such a claim by Guiliani unless he also had a contract with Wal-Mart. It appears, not surprisingly, that the contract in question was between Wal-Mart and Danco. Nothing in section 1981 provides a personal claim, so far as its language is concerned, to one who is merely affiliated – as an owner or employee – with a contracting party that is discriminated against by the company that made the contract.

Id. at 14 (footnote omitted).

Like the individual plaintiffs in *Searcy* and *Danco*, McDonald asserted no independent legal claim or right of his own in this case. Instead, he asserted only individual injuries stemming from alleged discrimination that affected JWM's contract rights. The Ninth Circuit's failure, here and in *Gomez*, to consider the legal rights asserted by the plaintiffs rather than their injuries alone has resulted

in an erroneous precedent with potentially enormous negative consequences.

C. The Existence of Individual Injuries Alone Has No Effect on the Standing Requirements of Section 1981

The Tenth Circuit recently reached the same result as the First, Fifth and Seventh Circuits – that a plaintiff without a contract has no standing under § 1981. *Guides Ltd. v. Yarmouth Group Prop. Mgmt., Inc.*, 295 F.3d 1065 (10th Cir. 2002). In dismissing the claims of the president and shareholder of the contracting corporation, the Tenth Circuit squarely rejected her contention that she had standing "because, as sole shareholder of [the corporation] she suffered injury separate and distinct from that of [the corporation]." *Id.* at 1071. The court held that where an individual plaintiff is not a party to the contract at issue, that plaintiff's emotional distress claims are by necessity derivative of the § 1981 claim of the contracting corporation and are not truly separate and distinct. *See id* at 1072-73 ("Foote suffered no violation of her contract rights . . . that was any way different from the violations claimed by Africa House. Her claim is derivative of that of Africa House and she does not have standing to sue on her own behalf.").

In reaching its decision, the Tenth Circuit specifically and carefully considered the *rights* asserted by the individual plaintiff, not just her *injuries*. The court reversed the district court judgment in favor of plaintiff, noting that the party seeking to contract with the defendants and to lease the property, and thus the direct victim of the alleged discrimination, was plaintiff's company rather than plaintiff herself. *Id.* at 1072. The court's standing analysis

was unaffected by plaintiff's allegations of injury because, absent a contractual relationship, plaintiff did not even meet the threshold requirements for bringing a claim under § 1981.

III. This Case Presents an Issue of Great National Importance and Deserves to be Reviewed Now Rather Than Later

This Court should grant this petition in order to ensure that § 1981 is properly and uniformly applied throughout the nation. It is necessary that this case be heard now rather than later because the Ninth Circuit's decision threatens to open the floodgates in that circuit to discrimination claims under § 1981 with little regard for the plain language of the statute or the constitutional requirements for standing. According to the Ninth Circuit, any officer, employee, or shareholder who suffers a "separate and distinct" injury as a result of discriminatory conduct involving a contract has a cause of action under § 1981, even if that person is not a party to the contract or otherwise involved in the contractual relationship. The practical consequence of this holding is that every employee, even of a nationwide corporation, would have a cause of action against a person or company who discriminated against the employer corporation, based on race, in its contractual dealings, so long as the employee is "embarrassed" or "humiliated" by the discrimination. This is a huge expansion of liability beyond that contemplated by the Civil Rights Act or recognized by other circuits.

The Ninth Circuit's tenuous reasoning and lack of analysis also deserves review by this Court, especially considering that the court's conclusion directly contradicts the well-reasoned holdings in other circuits. The issue of

standing under § 1981 has received a thorough and careful analysis by no less than four United States Courts of Appeals, and their unanimous verdict is that plaintiffs lacking a contractual relationship with a defendant have no standing under § 1981. The Ninth Circuit's rejection of this conclusion based solely on McDonald's allegations of separate and distinct injuries flies in the face of this Court's requirement that standing be premised on the zone of interests protected by the statute at issue.

The Ninth Circuit's failure, in *Gomez* and in this case, to make any inquiry into the basic requirements of standing under § 1981 leaves this area of law open to the possibility of widespread litigation, with little limitation on who can bring suit. The Civil Rights Act is a statute of national importance and deserves more careful review than it was given by the Ninth Circuit in this case. Domino's accordingly requests that this Court grant its petition.

CONCLUSION

For the reasons stated above, this Court should grant Domino's petition and clarify the scope of standing under § 1981.

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN MCDONALD, Plaintiff-Appellant, v. DOMINO'S PIZZA, INC.; et al., Defendants-Appellees.	No. 02-16900 D.C. No. CV-02-00311-LRH/PAL MEMORANDUM* (Filed June 18, 2004)

Appeal from the United States District Court
for the District of Nevada
Larry R. Hicks, District Judge, Presiding

Argued and Submitted December 4, 2003
San Francisco, California

Before: O'SCANNLAIN, HAWKINS, and FISHER, Circuit Judges.

Plaintiff-Appellant John McDonald appeals the district court's dismissal of his action brought under 42 U.S.C. § 1981. Because they are known to the parties, we do not recite the facts.

While a shareholder cannot maintain a civil rights action for injury suffered only by the corporation, *see Erlich v. Glasner*, 418 F.2d 226, 228 (9th Cir. 1969), we have acknowledged that "[t]he same discriminatory conduct can result in both corporate and individual

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

injuries." *Gomez v. Alexian Bros. Hosp.*, 698 F.2d 1019, 1021 (9th Cir. 1983). In *Gomez*, we held that a physician of Hispanic origin who practiced medicine as an employee of a professional corporation had standing to sue under 42 U.S.C. § 1981 when the defendant hospital rejected, for allegedly racial reasons, the corporation's contract proposal to operate the hospital's emergency room. *Id.* at 1021-22. The physician had alleged injuries distinct from that of the corporation, including loss of employment as director of the defendant's emergency room, as well as "humiliation and embarrassment." *Id.* at 1021.

Though our sister circuits may reach a contrary result, *see, e.g., Guides, Ltd. v. Yarmouth Group Prop. Mgmt., Inc.*, 295 F.3d 1065, 1071-73 (10th Cir. 2002), *Gomez* squarely controls this case. While McDonald was not formally a party to the contract, he may nonetheless sue under § 1981 insofar as he seeks recovery for individual injuries separate and distinct from contract damages suffered by JWM Investments, Inc.

REVERSED and REMANDED.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

JOHN McDONALD, Plaintiff, v. DOMINO'S PIZZA, LLC and DOMINO'S PIZZA, INC., a Michigan corporation; DEBBIE PEAR, individually, and JOHN DOES I through V, inclusive, DOE CORPORATIONS, VI through X, inclusive, Defendants.	CV-S-02-0311-LRH (PAL) ORDER (Filed Aug. 21, 2002)

Defendants filed a Motion to Dismiss on April 17, 2002, (Docket #7) pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim on which relief may be granted and, simultaneously, filed a Motion to Quash Service for lack of personal jurisdiction over Defendant Deborah Pear Phillips. (#8). Plaintiff filed an Opposition on May 6, 2002 (#12) and a Supplement to the Opposition on May 9, 2002 (#13), while Defendants filed a Reply on May 17, 2002. (#15).

Oral argument was heard on August 13, 2002, and the Court allowed the parties to submit supplemental memoranda to discuss cases that were raised at oral argument.

The central issue here is: does Plaintiff John McDonald have standing to bring a § 1981 action as the President and sole shareholder of JWM Investments if

Defendant Dominos Pizza violated the civil rights of JWM Investments?

I. Motion to Dismiss

A. Standard of Review

In considering a motion to dismiss, this Court must presume all well-pleaded allegations of material fact and must draw all reasonable inferences in favor of the non-moving party. *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 984 (9th Cir. 2000). However, the Court is not "required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 231 F.3d 520, 527-28 (9th Cir. 2000). There is a strong presumption against dismissing an action for failure to state a claim. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997). The issue is not whether Plaintiff will ultimately prevail, but whether he offers evidence in support of his claims. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 654 (1999). Consequently, the Court may not grant a Motion to Dismiss for failure to state a claim "unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

The liberal rules of notice pleading set forth in the Federal Rules of Civil Procedure do not require a plaintiff to set out in detail the facts supporting his claim. *Yamaguchi v. United States Dep't of the Air Force*, 109 F.3d 1475, 1481 (9th Cir. 1997) (quoting *Conley*, 355 U.S. at 47). All the Rules require is a "short and plain statement" that adequately gives the defendant "fair notice of what

the plaintiff's claim is and the grounds upon which it rests." *Yamaguchi*, 109 F.3d at 1481. Therefore, a plaintiff merely must plead sufficiently to "establish a basis for judgment against the defendant." *Id.* at 1481. Further, a claim is sufficient if it shows that the plaintiff is entitled to any relief which the court can grant, even if the complaint asserts the wrong legal theory or asks for improper relief. *Haddock v. Bd. of Dental Exam'r*, 777 F.2d 462, 464 (9th Cir. 1985).

B. Discussion

Section 1 of the Civil Rights Act of 1866 forbids discrimination on the basis of race in the making and enforcement of private as well as public contracts. *Runyon v. McCrary*, 427 U.S. 160, 168 (1976). Title 42 of the United States Code, section 1981 provides, inter alia, that "[a]ll persons within the United States shall have the same right in every State and Territory to make and enforce contracts, . . . as is enjoyed by white citizens." 42 U.S.C. § 1981. By its terms, section 1981 protects the contractual relationship itself and therefore limits the class of persons who may sue under section 1981 to persons in the contractual relationship. *See Kyles v. J.K. Guardian Security Serv., Inc.*, 222 F.3d 289, 303 (7th Cir. 2000).

Plaintiff relies, in large measure, on the position expressed in two cases from the District of Colorado. In both cases, the president/sole shareholder of a corporation alleged that the defendant corporation failed to award the parties a contract because of the race of the president/sole shareholder. *Great American Tool and Mfg. Co. v. Adolph Coors Co.*, 780 F.Supp. 1354 (D. Colo. 1992); *Rosales v.*

AT&T Info. Systems, Inc., 702 F.Supp. 1489 (D. Colo. 1988). In *Great American Tool*, the court followed the holding in *Rosales* by stating that "the corporation could assert a § 1981 claim because the president and sole shareholder's race stamped it with a 'minority racial identity.'" *Great American Tool*, 780 F.Supp. at 1355; *Rosales*, 702 F.Supp. at 1497. The courts in *Rosales* and *Great American Tool* then reasoned that "if [the corporation] has a racial identity based on [the shareholder plaintiff's] race then the [shareholder plaintiff's] § 1981 claim would effectively merge with [the corporation's] § 1981 claim." *Great American Tool*, 780 F.Supp. at 1356 (quoting *Rosales*, 702 F.Supp. at 1497-98). Under this analysis, these courts concluded that the president/sole shareholder had standing to assert a race discrimination claim. *Great American Tool*, 780 F.Supp. at 1356; *Rosales*, 702 F.Supp. at 1498.

Defendants, on the other hand, rely on the basic proposition that a corporation is a separate legal entity from its stockholders and officers. Therefore, with limited exceptions, a stockholder (even a sole stockholder) is without standing to assert the rights of the corporation or seek recovery for wrongs suffered by the corporation. *Gersman v. Group Health Ass'n. Inc.*, 931 F.2d 1565, 1569 (D.C. Cir. 1991), *vacated*, 502 U.S. 1068 (1992), *adhered to, on remand*, 975 F.2d 886 (D.C. Cir. 1992), *cert. denied*, 511 U.S. 1068 (1994); *Gregory v. Mitchell*, 634 F.2d 199, 202 (5th Cir. 1981); and *Ehrlich v. Glasner*, 418 F.2d 226, 228 (9th Cir. 1969) (holding that stockholder cannot maintain an action under the Civil Rights Act for damages suffered by a corporation).

Although the Ninth Circuit has not expressly addressed the issue presented in this case, it has addressed

the issue of a shareholder's standing to maintain a civil rights action in *Ehlich, supra. Ehrich*, in turn, is consistant with the Seventh Circuit decision in *Flynn v. Merrick*, 881 F.2d 446, 450 (7th Cir. 1989).

The problem with Plaintiff's Colorado cases is that the Tenth Circuit has, in effect, declared that they are no longer good law in Colorado and, therefore, essentially everywhere else. In *Guides, Ltd. v. Yarmouth Group Prop. Mgmt.*, 295 F.3d 1065 (10th Cir. 2002), the Tenth Circuit Court of Appeals held that while the a [sic] corporation had standing to assert a § 1981 claim, the sole shareholder and guarantor did not. *Id.* at 1072-73. This Court finds *Guides* compelling. As a consequence, this Court will follow the holdings of the District of Columbia and Tenth Circuits and find that while a corporation may assert a § 1981 claim, a president or sole shareholder may not step into the shoes of the corporation and assert that claim personally.

II. Conclusion

As a result of the foregoing, Defendants' Motion to Dismiss is GRANTED. (#7). Because the Motion to Dismiss renders Defendants' Motion to Quash Service for lack of personal jurisdiction over Defendant Deborah Pear (#8) moot, that motion is DENIED. The clerk is directed to close the file.

IT IS SO ORDERED.

DATED: August 21st, 2002

/s/ L. R. Hicks
LARRY R. HICKS
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN MCDONALD, Plaintiff-Appellant, v. DOMINO'S PIZZA, INC.; et al., Defendants-Appellees.	No. 02-16900 D.C. No. CV-02-00311-LRH/PAL District of Nevada, Las Vegas ORDER (Filed Aug. 2, 2004)

Before: O'SCANNLAIN, HAWKINS, and FISHER, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing.

Judge O'Scannlain voted to grant the petition for rehearing en banc. Judge Hawkins and Fisher voted to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
* * *

JOHN McDONALD, Plaintiff, vs. DOMINO'S PIZZA, LLC, AND DOMINO'S PIZZA, INC., Michigan corporation; DEBBIE PEAR, individually, and JOHN DOES I through V, inclusive; and DOE CORPORATIONS VI through X, inclusive, Defendants.	CV-S-02-0311-LRH-PAL

VERIFIED COMPLAINT AND DEMAND FOR JURY TRIAL

(Filed Mar. 8, 2002)

COMES NOW, Plaintiff John McDonald ("McDONALD"), by and through counsel, Victor M. Perri, Esq., and for causes of action against Defendants, Dominoes Pizza (DOMINO'S), hereby complains and alleges as follows:

JURISDICTION

1. This action is brought pursuant to 42 U.S.C. § 1981 and 42 U.S.C. § 1988 to redress the deprivation of rights under the Fourteenth Amendment to the United States Constitution.

2. The jurisdiction of this Court is based upon 28 U.S.C. § 1343(3) and (4).

3. This Court is authorized to render declaratory relief under 28 U.S.C. § 2201 and 28 U.S.C. § 2202 as well as Rule 57 of the Federal Rules of Civil Procedure.

4. All discriminatory employment practices alleged herein were committed within the State of Nevada and therefore venue is proper in this Court.

PARTIES

5. Plaintiff John McDonald ("McDONALD") is and was at all times relevant thereto a resident of Clark County, State of Nevada.

6. McDONALD is African-American, and therefore is a member of a protected class.

7. Defendant DOMINO'S PIZZA, LLC, AND DOMINO'S PIZZA, INC., is a Michigan corporation engaged in the business of operating a nationwide pizza restaurant chain with purposeful and continuing contacts with the state of Nevada, engaging in the business of operating multiple restaurants in Nevada.

8. DEBBIE PEAR, (PEAR) a Real Estate Negotiator for DOMINO'S at all times relevant to this complaint was a resident of Michigan.

9. McDONALD is ignorant of the true names, identifies, and capactities of the Defendants sued under the fictitious names identified as JOHN DOES I through V,

inclusive, and DOE CORPORATIONS VI through X, inclusive. McDONALD is informed and believes that each of the Defendants fictitiously named acted or omitted to act as alleged herein, directly and proximately causing injury to McDONALD, for which they are consequently responsible. McDONALD shall seek to amend this Complaint to assert the true names and capacities, whether individual, corporate, or otherwise, as the Defendants are identified.

10. McDONALD in his capacity as President of JWM Investments, a Nevada Corporation, did contract with DOMINOES to build several stores for Defendant to lease in and around Las Vegas, Nevada.

STATEMENT OF FACTS

11. Plaintiff is the President, owner and operator of JWM Investments, Inc., (JWM) a Nevada Corporation. To McDONALD's information and belief he was the only black developer utilized by Domino's to construct in the Southwestern United States.

12. Plaintiff acting for JWM in January of 1997 entered into four corporately secured lease contracts to construct multiple restaurants in and around Las Vegas, Nevada, for DOMINO's to lease for a period of ten years with options to extend the leases. The leases were for restaurants to be constructed at Camino Al Norte in North Las Vegas, 4515 Bonanza Road in Las Vegas, at or near the intersection of Las Vegas Blvd. N. and Alexander, and at the intersection of Russell and Merrill St.

13. The contracts were amended in June of 1997 because DOMINO'S desired larger restaurants then originally agreed upon, which delayed construction, additionally Plaintiff did not contract with anyone for architecture

or interior design of the buildings as provided for by the lease.

14. The Camino Al Norte location was completed for DOMINO'S and the certificate of occupancy issued in May of 1998 well within the time frame dictated by the lease agreement.

15. The relationship between Plaintiff and DOMINO'S soured during construction of the Bonanza location. The location encountered problems with city zoning and Plaintiff put his full effort into getting the building constructed, as was recognized by local DOMINO'S employees.

16. The contracts between JWM and DOMINO'S stated that if required to do so for financing and/or sale purposes DOMINO'S would execute estoppel certificates for JWM.

17. Nonetheless Real Estate Negotiator for Dominoes, PEAR, refused to sign any requests sent on behalf of JWM.

18. PEAR called the Las Vegas Valley Water District and intentionally removed Plaintiff as landowner and falsely substituted herself and DOMINO'S. This required Plaintiff to personally go to the Water District and prove ownership of the land.

19. Plaintiff called PEAR on the phone and stated his determination to fulfill the contracts despite her attempts to interfere he would go forward with the project's completion. PEAR at this point told Plaintiff she would see to it that Plaintiff would experience serious financial reproductions and the loss of his business and financial position if he didn't voluntarily terminate his dealings with DOMINO'S after completing the Bonanza Road restaurant. Plaintiff then reminded PEAR he had four contracts with DOMINO'S

and explained that he intended to see them through to completion. PEAR then responded that she had little tolerance for dealing with Plaintiff and stated, "I don't like dealing with ***you people*** [s/ JMW] anyway." PEAR then refused to explain her "you people" comment and said she would see to it that DOMINO'S did no further business with Plaintiff and threatened to use the company's attorneys to bury Plaintiff in the event a court action was initiated and further told Plaintiff he, "didn't have a chance in Hell," of winning and hung up before Plaintiff could respond

20. After that call Plaintiff's dealings with DOMINO'S were routed to Vice President and General Counsel Joe Graziani.

21. Mr. Graziani told Plaintiff that despite PEAR's comments DOMINO'S would move on further with the lease contracts and sign the estoppel certificates only if Plaintiff agreed to amend the contracts. To McDONALD's information and belief DOMINO'S failed and refused to investigate whether PEAR was acting in an arbitrary and discriminatory manner towards McDONALD after McDONALD complained about PEAR to Mr. Graziani.

22. DOMINO'S refusal to provide the necessary estoppel certificates caused Plaintiff to lose financing for the projects which had not been started.

23. To the extent DOMINO'S allowed him to by their breach of contract Plaintiff performed his obligations under the contract to the specifications set out by Dominoes.

24. During this frustrating process Plaintiff had numerous construction offers which he was unable to secure because DOMINO'S intentionally ignored document requests. JWM also had potential sales of real properties with purchases which failed to close because of

the refusal to sign estoppel certificates and to abide my contractual obligations with JWM due to racial animus towards McDONALD.

25. As Plaintiff's business depends on the ability to secure land in order to prosper, he was unable to move forward with other projects or these projects without the estoppel certificates.

26. Additionally Plaintiff was forced by DOMINO'S refusal to sign the estoppel certificates to sit on the land he already possessed and not develop, sell or lease them.

27. DOMINO'S thus locking up of resources caused the corporation, JWM Investments, Inc, wholly owned by McDONALD as a minority business to have to file chapter 11 Bankruptcy.

28. DOMINO'S further breached their contractual obligations by failing to pay rent on completed restaurants which they had already occupied, after JWM Investments, Inc. filed a Chapter 11 Bankruptcy Case No. 00-19303 LBR planning or anticipating the financial collapse of JWM and McDONALD.

29. Prior to PEAR and GRAZIANI being assigned to oversee the contract with JWM, DOMINO'S dealt with JWM in good faith.

30. Once assigned to the JWM contract PEAR and GRAZIANI did purposefully act on behalf of DOMINO'S to breach the contracts between JWM and DOMINO'S and refuse to act in good faith to allow JWM to perform.

31. Plaintiff repeatedly attempted to settle this matter with DOMINO'S without filing a lawsuit. In settlement discussions DOMINO'S was more interested in attacking Plaintiff personally then in resolving the matter.

FIRST CAUSE OF ACTION

VIOLATION OF 42 U.S.C. SECTION 1981

32. McDONALD restates and realleges each and every allegation contained in paragraphs 1 through 32 inclusive and incorporates those paragraphs herein by reference.

33. 42 U.S.C. § 1981, as amended, guarantees that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens."

34. 42 U.S.C. § 1981, as amended, prohibits racially discriminatory conduct that occurs from the inception through the end of a contract.

35. McDONALD is a person as encompassed within the meaning of 42 U.S.C. § 1981.

36. As a resident of Nevada, McDONALD is within the jurisdiction of the United States.

37. At all times relevant thereto, McDONALD acting for JWM had contracts with DOMINO'S, which contained all of the essential elements of a valid contract: offer, acceptance, and bargained for consideration.

38. DOMINO'S offered, explicitly, to pay JWM operated by McDONALD for performance of services.

39. McDONALD accepted that offer by JWM's construction of the restaurants, which constitutes performance, for DOMINO'S to lease.

40. McDONALD's performance through JWM of services for DOMINO'S served as consideration for DOMINO'S promise to pay him for his services.

41. DOMINO'S promise to lease from McDONALD the completed restaurants served as consideration for his performance under the contract.

42. DOMINO'S purposefully failed to perform its obligations under the contract.

43. Upon information and belief Plaintiff believes DOMINO'S has not failed to perform similar obligations with non-minority businesses.

44. The acts as previously stated constitute racially discriminatory conduct that occurred during the term of a contract.

45. The above discriminatory acts and practices by DOMINO'S constitute racially discriminatory conduct during the term of a contract as prohibited by 42 U.S.C. § 1981..

46. As a result of Defendant's discriminatory acts, McDONALD has suffered, is suffering and will continue to suffer monetary damages and damages for pain and suffering, emotional distress, and humiliation unless and until this court grants relief, all in an amount in excess of $10,000.00, to be determined at trial.

47. DOMINO'S acted oppressively, fraudulently, maliciously, and in bad faith towards McDONALD to deprive him of his legal and statutory rights and in bad faith with conscious disregard for McDONALD' known rights. In so acting DOMINO'S intended and did vex, injure and harm McDONALD in a willful, oppressive and deliberate manner, which should be determined by the court for which McDONALD respectfully requests punitive or exemplary damages in an amount in excess of $10,000.00.

WHEREFORE, McDONALD requests this honorable court to enter judgment as follows:

1. Enjoining and permanently restraining the violations of Title VII, 42 U.S.C. § 1981;

2. Requiring Defendant to pay all of its obligations under the contracts which McDONALD would have received, but for the discriminatory practices, including, but not limited to front pay, back pay and other lost benefits;

3. Awarding compensatory damages for pecuniary losses, including pain and suffering, emotional distress, mental anguish, and humiliation in an amount to be determined at trial;

4. Awarding punitive damages to McDONALD;

5. Awarding McDONALD the costs of this action together with reasonable attorney's fees; and

6. Such other and further relief as this court deems just and proper.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b), Federal Rules of Civil Procedure, McDONALD demands a trial by jury in this action.

Dated this 8 day of March, 2002.

Respectfully submitted by

/s/ Victor M. Perri
Victor M. Perri, Esq.
Nevada Bar No. 001267
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Telephone (702) 385-1340
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Attorney for Plaintiff

VERIFICATION OF JOHN McDONALD

STATE OF NEVADA)
) :ss.
COUNTY OF CLARK)

JOHN McDONALD, under penalty of perjury, being first duly sworn, deposes and states:

That he is the Plaintiff in the above-entitled action; that he has read the foregoing **VERIFIED COMPLAINT AND DEMAND FOR JURY** and knows the contents thereof; that the same is true of his own knowledge, except those matters therein contained stated upon information and belief, and as to those matters, he believes them to be true.

DATED this 8th day of March, 2002.

/s/ John McDonald
JOHN McDONALD

SUBSCRIBED AND SWORN
to before me on this 8th day of
March, 2002.

/s/ Sarah Daniels
NOTARY PUBLIC, In and For
Said County and State

(SEAL)
No: 92-3065-1
NOTARY PUBLIC
STATE OF NEVADA
County of Clerk
SARAH DANIELS
My Appointment
Expires Sept. 26, 2005

CERTIFICATE OF MAILING

On the 8th day of March, 2002 I, as an employee of Victor M. Perri, Esq., hereby certify that I mailed the foregoing VERIFIED COMPLAINT AND DEMAND FOR JURY TRIAL to the parties hereto, first class mail, with postage full prepaid thereon, addressed as follows:

Kaaren Thomas, Esq.
BECKLEY SINGLETON
530 Las Vegas Blvd. So.
Las Vegas, Nevada 89101

/s/ Jessica Daniels
Jessica Daniels, an employee
of Victor M. Perri, Esq.